

MICHELSON, KANE, ROYSTER & BARGER, P.C.

ATTORNEYS AND COUNSELORS AT LAW

HARTFORD SQUARE NORTH
TEN COLUMBUS BOULEVARD
HARTFORD, CONNECTICUT 06106

RICHARD L. BARGER
STEVEN B. KAPLAN
MARK E. BLAKEMAN†
PAUL S. TAGATAC

Telephone (860) 522-1243
Facsimile (860) 548-0194
www.mkrb.com

PAUL R. FITZGERALD†
BETH N. MERCIER
CAROLYN A. YOUNG #

† ALSO ADMITTED IN
MASSACHUSETTS

ALSO ADMITTED IN
NEW YORK

Testimony of Attorney Steven B. Kaplan
Legal Counsel to the Connecticut Subcontractors Association
Re: Raised Bill No 5328--
“An Act Concerning Public Work Contract Retainage and
Enforcement of the Right to Payment on a Bond”
COMMITTEE ON GENERAL LAW-- March 3, 2016

My name is Steven Kaplan. I am a partner with the Hartford law firm of Michelson, Kane, Royster & Barger P.C., where I have practiced construction law for 35 years. Our firm routinely represents contractors, subcontractors, construction managers, design professionals, towns, and private owners in all matters involving contracts for public and private construction. I am Legal Counsel to the Connecticut Subcontractors Association, as well as a past Chairman and a founding member of the Construction Law Section of the Connecticut Bar Association.

The Connecticut Subcontractors Association, and the entire subcontracting community, supports Raised Bill No 5328, “An Act Concerning Public Work Contract Retainage and Enforcement of the Right to Payment on a Bond.” This legislation would amend Conn. Gen. Stat. §49-41b in two respects: first, it would reduce retainage of earned contract funds from 10% to 5% on State construction projects; second, it would provide an enforcement mechanism when payment bond sureties do not follow the statutory requirements to “pay or deny claims,” in whole or in part, within ninety days. We thank the General Law Committee for considering this important legislation

Section 1 of HB 5328 amends Connecticut General Statutes §49-41b(1) to allow State agencies to retain 5% on payments for work performed and accepted on State construction projects. The current law allows the State to retain 10% on earned contract amounts. The current 10% retainage level is excessive and unnecessary. It is out of step with the longstanding provisions in subdivision (2) of the statute, which allows for 2.5% retainage by CDOT and subdivision (3), which allows for 5% retainage on municipal projects. Also, retainage on most private projects is limited to 5% as well, per Conn. Gen. Stat. section 42-158k. These lower retainage levels have worked perfectly well for all other types of construction projects in Connecticut for many, many years.

The 10% retainage for State projects is also out-of-step with most of the other eastern states, which permit only the lower 5% retainage-- including MA, NY, RI, NJ, ME, DE, VA, NC, & SC.

It also is important to note that all public construction projects require performance and payment bonds to ensure both completion of the work and payment of all subcontractors and suppliers.

Excessive retainage is a totally duplicative and unnecessary mechanism for either purpose. As all construction professionals know, projects don't go "bad" because contractors are getting paid promptly for work that has been properly performed and accepted by the owner.

It is unreasonable to require contractors to finance State construction projects by waiting until the end of a project to be paid for 10% of the completed contract amount for the work accepted by the owner one or more years earlier. This also will eliminate a very substantial disincentive that prevents many talented and able contractors from bidding on state construction projects.

Section 2 of HB 5328 amends Conn. Gen. Stat. section 49-42(a) to allow a subcontractor or supplier on a public construction project to collect reasonable attorneys fees and costs if the payment bond surety company does not respond to a claim for payment in the time frames required by the statute, and the claimant is ultimately successful in collecting payment.

The statute already requires that "the surety **shall** make payment under the bond" for all non-disputed claims within ninety days after notice of the claim, "and **shall** serve a notice on the claimant denying liability for any unpaid portion of the claim." Unfortunately, in a recent decision, *Electrical Contractors, Inc. v. Insurance Company of the State of Pennsylvania*, 314 Conn. 749 (2014), the Connecticut Supreme Court ruled that this language was "directory," not "mandatory." Therefore, the surety now faces no consequences of any kind for failing to meet the statutory requirement for prompt settlement of claims.

HB 5328 would allow for attorneys fees and costs to reimburse a claimant that had to file a lawsuit when the surety did not follow the statutory requirement for a timely response to claims. It provides an enforcement mechanism for the time requirements that are already set forth in the statute.

The current statute does provide that a court may award reasonable attorneys fees to either party if the original claim, the surety's denial of liability, or the defense interposed to the claim was without substantial basis in fact or law. But this provision does not promote the prompt settlement of claims.

The language for this proposal is copied verbatim from the American Institute of Architects (AIA) Payment Bond A312 (§7.3) for awarding attorneys fees. (Note: the proposal also provides for reasonable "costs" as well.) This AIA Payment Bond form is widely used in most private, and many municipal construction projects across the nation and in Connecticut. There is no good reason not to apply the same language to all public building projects in our State.

Please note that the fundamental rationale for requiring a payment bond on public construction projects under Conn. Gen. Stat. section 49-41 is to guarantee prompt payment to the subcontractors and vendors who perform the work and provide the materials for these projects. (Mechanic's liens are not allowed on public construction projects.) This proposal advances the underlying purpose of that statute.

Again, thanks to the General Law Committee for considering this important legislation.